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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-26

ELIZABETH JANE YOUNG CHIN,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

No. 77-32

KENNETH R. CHIN,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF THE ASIAN-AMERICAN LEGAL DEFENSE AND EDUCATION FUND FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

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On the brief:

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MOTION OF THE ASIAN-AMERICAN LEGAL DEFENSE AND EDUCATION FUND FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Asian-American Legal Defense and Education Fund respectfully moves, pursuant to Rule 42 of this Court's rules, to file the within brief amicus curiae. Counsel for the petitioners have consented to the filing of this brief; the Solicitor General has not responded to our request for consent.*

The Asian-American Legal Defense and Education Fund is a national organization of attorneys, law students, legal workers and concerned citizens committed to protecting the civil rights of Asian-Americans through litigation. The issues in this case have broad significance for the Asian-American community. Our major concern centers on the racially prejudicial inferences contained in the affidavit of the United States Secret Service to support their search warrant application. Furthermore, this case raises important questions concerning the legal standard to be applied in determining the sufficiency of search warrant affidavits containing false statements. Since these issues have ramifications that extend beyond the particular case before the Court, we seek the opportunity to present our views on this matter and respectfully move for leave to file this brief.

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* Copies of the letters from petitioners and the request for consent from the Solicitor General are being lodged with the Clerk.

Respectfully submitted,

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and Education Fund
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Attorney for Amicus Curiae

September 22, 1977

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 77-26

ELIZABETH JANE YOUNG CHIN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

No. 77-32

KENNETH R. CHIN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
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BRIEF OF THE ASIAN-AMERICAN LEGAL DEFENSE
AND EDUCATION FUND AS AMICUS CURIAE

Interest of Amicus Curiae

The Asian-American Legal Defense and Education Fund is a national organization committed to defending the civil rights of Asian Americans through litigation and education. A particular concern of the organization is the protection of rights guaranteed under the First and Fourth Amendments which assure freedom of association and the freedom from unlawful government intrusions. The Asian-American Legal Defense and Education Fund believes that this case will have a profound effect upon the exercise of these constitutionally protected rights by members of the Asian-American community.

REASONS FOR GRANTING THE WRIT

I.

INTRODUCTION

The arrest of petitioners received nationwide attention when the media reported their participation in an alleged conspiracy to assassinate Emperor Hirohito of Japan during his visit to the United States in 1975. These arrests took place in the context of two well-publicized attempts on President Ford's life only one month before, and in a climate of public concern about the security of government officials and foreign dignitaries. In particular, the United States Secret Service had come under severe attack and close public scrutiny for its failure to perform its duties effectively.

In the instant case, the false and misleading statements by a Secret Service agent ultimately led to an illegal search of the petitioners' home and their subsequent conviction on unrelated charges for the illegal transport of weapons across state lines.*

The media's sensationalism in reporting this case has had a severe impact on the image of Asian-Americans and the political climate in Asian-American communities. Asian-Americans have in the past been portrayed in the media as the "Yellow Peril" and a threat to national security in times of war. When public opinion is directed adversely against minority groups, the rule of law becomes more vulnerable, and constitutional safeguards are compromised. For Asian-Americans, this tragic lesson was brought close to home when Congress and the courts upheld the internment of Japanese Americans during World War II solely because of their Japanese ancestry. See Korematsu v. United States, 323 U.S. 214 (1944).

The petitioners have demonstrated their dedication and commitment to serve the Asian-American community and have no prior criminal record. The Secret Service's accusations of the petitioners' involvement in an alleged assassination plot stemmed from an attempt to draw tenuous connections between the petitioners and "political extremists"--a connection that ultimately was abandoned because of the

*For the purposes of this brief, the amicus curiae adopts the statement of facts set forth in Petitioner's Brief at 3-8.

total absence of proof. Many Asian-Americans working in their communities come into contact with other Asians of different political persuasions. Mere association with political activists must not be used as the basis for subjecting Asian-Americans to unlawful government harassment.

II.

THIS COURT SHOULD RESOLVE THE CONFLICT AMONG CIRCUITS OVER THE SUFFICIENCY OF A SEARCH WARRANT AFFIDAVIT CONTAINING FALSE STATEMENTS.

At present, the circuit courts of appeals are divided on the issue of whether a search warrant is valid if the underlying affidavit contains misrepresentations. Four circuits have held that a negligent material misrepresentation in an affidavit does not justify the suppression of evidence. Instead, the law enforcement officer must have been reckless in his misrepresentation in order for the search warrant to be invalidated. United States v. Carmichael, 489 F.2d 983, 987-90 (7th Cir. 1973); United States v. Lee, 540 F.2d 1205, 1208-09 (4th Cir.), cert. denied, 97 S. Ct. 255 (1976); United States v. Luna, 525 F.2d 4, 6-9 (6th Cir. 1975), cert. denied, 96 S. Ct. 1459 (1976); United States v. Marihart, 492 F.2d 897, 899-900 (8th Cir.), cert. denied, 419 U.S. 827 (1974). In addition, the Sixth Circuit has ruled that if the false statement was made with an intent to deceive, the search warrant is invalid, even though the misrepresentation was not material. United States v. Luna,

supra. The Second, Fifth and Tenth Circuits have adopted a contrary standard and would quash a warrant where any material misrepresentation had been made. United States v. Pond, 523 F.2d 210, 213-14 (2d Cir. 1975), cert. denied, 423 U.S. 1058 (1976); United States v. Thomas, 489 F.2d 664, 667-72 (5th Cir. 1973), cert. denied, 423 U.S. 844 (1976); United States v. Harwood, 470 F.2d 322, 324-25 (10th Cir. 1972). The Second Circuit has further held that if the false statement was made intentionally, the warrant should be invalidated even though the misrepresentation was not material. United States v. Pond, supra.

The search warrant in the instant case was issued on the basis of two affidavits--the "Affidavit for Search Warrant" (hereinafter "Original Affidavit") (A-1)* and "Supplemental Affidavit" (A-4) --submitted by Special Agent Neal Findley of the United States Secret Service on October 3, 1975. The Supplemental Affidavit contained the allegation that petitioner Elizabeth Jane Young Chin resided at 4303 Arlington Avenue in Los Angeles, California with Joanne Miyamoto in 1973. Agent Findley later conceded that this statement was false. In an affidavit submitted on January 28, 1976, to petitioner Kenneth R. Chin's lawyer, Findley stated:

> it is true that Joanne Miyamoto did not reside at that address; however, she did reside in an adjoining two story house at 2208-43rd Street immediately

*"A-___" refers to the Appendix attached to this brief amicus curiae.

> around the corner from the one-story residence of Ms. Young at 4304 Arlington Avenue.
>
> Reply Affidavit of Neal Findley, January 28, 1976 (A-13).

With regard to the false statement, the district court found that "the /original/ affidavit in support of the warrant is sufficient. The alleged misstatements in the supplemental affidavit are therefore inconsequential." * By affirming the district court's decision without opinion and thereby adopting the ruling below in all respects, the Second Circuit failed to consider the materiality of or the intent with which the false statements were made.

Agent Findley admitted to "the haste with which the information was gathered and the supplemental affidavit was prepared." (A-3). The pressured atmosphere surrounding the affiant's investigation strongly suggests that his misstatements were made knowingly and intentionally. The supplemental affidavit does not charge the petitioners directly with involvement in a conspiratorial plot to assassinate the visiting Emperor. Instead, Agent Findley piled inference upon inference in an attempt to connect petitioners with individuals who were termed "political extremists." The series of linkages set forth in the Supplemental Affidavit formed a tenuous chain: petitioner resides with Joanne Miyamoto in 1973; Miyamoto is a member of Asian Americans for Action; Mary Kochiyama,

*See Memorandum Decision and Order Denying Motion to Suppress, quoted in Petitioner's Brief at 11a.

also a member of Asian Americans for Action, is a contact for extremist groups, including the Black Panther Party and the Black Liberation Army. (A-5 to A-6). These "supplementary" statements so inflamed the magistrate that an impartial determination of the sufficiency of the original affidavit was all but impossible. Agent Findley's misstatements were based on mere suspicion and could only have been made with reckless disregard or with intent to deceive the reviewing magistrate. In view of the severity of the crime implied--conspiracy to assassinate the Emperor of Japan--greater attention to the reliability of the affiant's information was required.

The elimination of the false statement and the assessment of the affidavit's sufficiency in light of the remaining allegations opens the door to overzealous officials who would have "everything to gain and nothing to lose in strengthening an otherwise marginal affidavit by letting their intense dedication blur the distinction between fact and fancy." United States v. Belculfine, 508 F.2d 58, 60-63 (1st Cir. 1974). See also United States v. Morris, 477 F.2d 657, 662 (5th Cir.), cert. denied, 414 U.S. 852 (1973). Such misstatements by Agent Findley were material and intentional, and resulted in a violation of the petitioners' Fourth Amendment rights.

III.

A SEARCH CONDUCTED UPON THE ISSUANCE OF A WARRANT FOR WHICH THERE IS NO PROBABLE CAUSE IS PATENTLY ILLEGAL.

No probable cause existed for the issuance of a search warrant based upon information submitted by Agent Findley. The failure of the district court (and, by adoption of the lower court's opinion, the Second Circuit) to consider the Supplemental Affidavit in its finding of probable cause was improper. The Supplemental Affidavit cannot be severed from the original since they were simultaneously submitted by the same affiant on the same date. Furthermore, they were read and considered together by the magistrate in his determination of probable cause. The mere designation of allegations as a "Supplemental Affidavit" does not detach the allegations therein from being read together with the original affidavit as one continuous whole. Paragraph 5 of the Original Affidavit (A-3) in fact incorporates the Supplemental Affidavit within the original.* Moreover, severance can only result in a legal fiction that provides no assurance that the magistrate, who had both affidavits before him, was not unduly influenced by the highly inflammatory assertions made in the Supplemental Affidavit. See Bruton v. United States, 391 U.S. 123 (1968).

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*Paragraph 5 of the Original Affidavit provides as follows:

> 5. Additional grounds to support the issuance of a search warrant for the above-described premises are contained in a Supplemental Affidavit of your deponent which is submitted herewith.

The allegations in the Original Affidavit are not indicative of any violation of 18 U.S.C. § 922(a)(6).* The mere purchase or possession of a weapon is no inference of false identification in violation of the statute. United States v. Mendoza, 487 F.2d 309 (5th Cir. 1973).

* 18 U.S.C. § 922(a)(6) provides that:

> It is unlawful * * *
>
> (6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness or the sale or other disposition of such firearm or ammunition under the provisions of this chapter.

In paragraphs 2 and 3 of the Original Affidavit, the affiant makes no explicit assertions of his personal observation of Postal Service records.* He also failed to assert the underlying circumstances that would reveal the source of the inform-

*Paragraphs 2 and 3 of the Original Affidavit provide as follows:

> 2. At the time of the purchase described in paragraph 1 above, Copeland advised that Elizabeth Jane Young identified herself by means of a California drivers license, H-3849891, which reflected her address to be 1555 6th Avenue, Los Angeles, California. Investigation by your deponent and other Special Agents of the United States Secret Service which revealed that on June 11, 1974, Elizabeth Jane Young notified United States Postal Authorities in Los Angeles, California to forward all mail addressed to her to 3306 92 Street, Apartment 5L, Jackson Heights, New York.
>
> 3. Further investigation by your deponent and other Special Agents of the United States Secret Service which revealed that on August 30, 1974, Elizabeth Jane Young notified United States Postal Service officials of a change of address to 925 Union Street, Apartment 4B, Brooklyn, New York.

er's information or present any objective evidence that the unnamed informant is credible or that his information is reliable. Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1944). Agent Findley submitted petitioner's notification to United States Postal Service officials of a change of address from Los Angeles, California to Jackson Heights, New York on June 11, 1974, and of a subsequent change from Jackson Heights, New York to Brooklyn, New York on August 30, 1974, as evidence that petitioner continued to reside in New York on July 29, 1975--the date of the purchase of the firearms. Since notification to the Postal Service is not a requirement but merely a convenience, it cannot be used as proof that petitioner did not move to California after August 30, 1974.

Affiant's statement in paragraph 4 of the Original Affidavit* that petitioner resided

* Paragraph 4 of the Original Affidavit provides as follows:

> 4. Investigation by your deponent and other Special Agents of the United States Secret Service which revealed that Elizabeth Jane Young presently resides at 925 Union Street, Apartment 4B, Brooklyn, New York. Such investigation included personal observation by Special Agent John Cunniff of the United States Secret Service of the premises above-described, which revealed the name "Young" on the mailbox for Apartment 4B.

"presently" at 925 Union Street was not based on observation of her physical presence, but merely of a surname on the mailbox. The surname "Young" is common to numerous individuals, Asian and non-Asian alike. It is not legally probative of petitioner's residence at that time. Together with the information regarding the postal records, the affiant attempted to demonstrate that the petitioner resided at 925 Union Street in Brooklyn on October 3, 1975 and, by inference, on July 29, 1975. A prudent person could reasonably conclude that sometime between August 30, 1974 and October 3, 1975--and specifically on July 29, 1975--the petitioner resided in California. Thus, the Original Affidavit contained no reasonable basis to believe that a crime had been committed in violation of 18 U.S.C. § 922(a)(6).

The Supplemental Affidavit neither alleges the commission of a crime nor contributes to the factual basis for the crime alleged in the Original Affidavit. Yet, it is the supplemental affidavit that contains the statements connecting the petitioner by race alone to "political extremists." Once the petitioner was acknowledged to have been only a neighbor of Miyamoto rather than a co-resident, the only linkage between the two was that of their race. The chain of inferences then collapsed and, as discussed above, probable cause for the issuance of the warrant became conspicuously lacking.

CONCLUSION

The Second Circuit failed to apply the proper standard when it affirmed the district court's finding of probable cause in the issuance of the search warrant. The Government should not have been permitted to make prejudicial inferences based on race or political association that have no legal probative value, and which ultimately colored the magistrate's determinations. This Court should issue a writ of certiorari to review the judgment below.

Respectfully submitted,

BENJAMIN GIM
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New York, New York 10002

Attorney for Amicus Curiae*

On the brief:

Kenneth Chu
Margaret Fung
Stanley Mark
Lisa Yee

September, 1977

APPENDIX

APPENDIX

AFFIDAVIT OF NEAL FINDLEY FOR SEARCH WARRANT SWORN TO OCTOBER 3, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
---------- x
UNITED STATES OF AMERICA

-against-

PREMISES KNOWN AS APARTMENT 4B, 925 UNION STREET, BROOKLYN, NEW YORK, SUCH PREMISES BEING A SIX STORY BRICK BUILDING, SUCH BUILDING BEING POPULARLY KNOWN AS THE MILDRED BUILDING,

Defendant.
----------x

AFFIDAVIT FOR SEARCH WARRANT

EASTERN DISTRICT OF NEW YORK, SS:

NEAL FINDLEY, being duly sworn, deposes and says that he is a Special Agent of the United States Secret Service, duly appointed to law and acting as such.

Your deponent has reason to believe that within the PREMISES KNOWN AS APARTMENT 4B, 925 UNION STREET, BROOKLYN, NEW YORK, SUCH PREMISES BEING A SIX STORY BRICK BUILDING, SUCH BUILDING BEING POPULARLY KNOWN AS THE MILDRED BUILDING, within the Eastern District of New York, there is now being con-

cealed a firearm, to wit, one AR-180 semi-automatic rifle, bearing serial number S-12585, which firearm constitutes evidence of a violation of Title 18, United States Code, Section 922(a)(6).

The source of your deponent's information and the grounds for his belief are:

1. An interview by Special Agents of the United States Secret Service of Carl V. Copeland, Jr., a salesman at Coles Sporting Goods Store, Inglewood, California, a licensed firearms dealership, wherein he stated that he sold the above-described firearm, serial number S-12585, for $270 to a person who identified herself as Elizabeth Jane Young on July 29, 1975.

2. At the time of the purchase described in paragraph 1 above, Copeland advised that Elizabeth Jane Young identified herself by means of a California drivers license, H-3849891, which reflected her address to be 1555 6th Avenue, Los Angeles, California. Investigation by your deponent and other Special Agents of the United States Secret Service which revealed that on June 11, 1974, Elizabeth Jane Young notified United States Postal Service authorities in Los Angeles, California to forward all mail addressed to her to 3306 92 Street, Apartment 5L, Jackson Heights, New York.

3. Further investigation by your deponent and other Special Agents of the United States Secret Service which revealed that on August 30, 1974, Elizabeth Jane Young notified United States Postal Service

officials of a change of address to 925 Union Street, Apartment 4B, Brooklyn, New York.

4. Investigation by your deponent and other Special Agents of the United States Secret Service which revealed that Elizabeth Jane Young presently resides at 925 Union Street, Apartment 4B, Brooklyn, New York. Such investigation included personal observation by Special Agent John Cunniff of the United States Secret Service of the premises above-described, which revealed the name "Young" on the mailbox for Apartment 4B.

5. Additional grounds to support the issuance of a search warrant for the above-described premises are contained in a Supplemental Affidavit of your deponent which is submitted herewith.

WHEREFORE, your deponent respectfully requests that a search warrant be issued authorizing your deponent or any Special Agents of the United States Secret Service to search the PREMISES KNOWN AS APARTMENT 4B, 925 UNION STREET, BROOKLYN, NEW YORK, SUCH PREMISES BEING A SIX STORY BRICK BUILDING, SUCH BUILDING BEING POPULARLY KNOWN AS THE MILDRED BUILDING and to seize the above-described firearm and any other evidence relevant thereto.

/s/ Neal Findley
S/A Neal Findley, U.S.S.S.

Sworn to before me this
3rd day of October 1975

VINCENT M. CAPOGGIO

A TRUE COPY

SUPPLEMENTAL AFFIDAVIT OF NEAL FINDLEY FOR SEARCH WARRANT, SWORN TO OCTOBER 3, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x
UNITED STATES OF AMERICA

-against-

PREMISES KNOWN AS APARTMENT 4B, 925 UNION STREET, BROOKLYN, NEW YORK, SUCH PREMISES BEING A SIX STORY BRICK BUILDING, SUCH BUILDING BEING POPULARLY KNOWN AS THE MILDRED BUILDING,

Defendant.
----------x

SUPPLEMENTAL AFFIDAVIT

EASTERN DISTRICT OF NEW YORK, SS:

NEAL FINDLEY, being duly sworn, deposes and says that he is a Special Agent of the United States Secret Service, duly appointed according to law and acting as such.

This Supplemental Affidavit is submitted in connection with and in support of an application for a search warrant for the above-described premises. A search warrant is sought in connection with an investigation surrounding the official visit of Emperor Hirohito of Japan to the United States and, more particularly, to the City of New York which is currently scheduled to take place between the 4th day of October

1975 and the 7th day of October 1975. The additional grounds to support the issuance of the search warrant are as follows:

1. Investigation by Special Agents of the United States Secret Service which revealed that during the year 1973 Elizabeth Jane Young resided at 4303 Arlington Avenue, Los Angeles, California with one Joanne Miyamoto. This information was derived by an examination of the records of the United States Postal Service and by an independent investigation of the Federal Bureau of Investigation.

2. [material deleted] Joanne Miyamoto and Mary Kochiyama have been attempting to gain access to functions that would be attended by Emperor Hirohito.

3. Investigation by Special Agent George Hofmann of the United States Secret Service on the morning of October 3, 1975 conducted at Apartment 3B, 545 West 126 Street, Manhattan, which revealed that the above-named Mary Kochiyama currently resides at that address. This investigation included an interview by Special Agent Hofmann of the occupants of Apartment 3B, 545 West 126 Street, Manhattan, who confirmed the fact that Mary Kochiyama resided at the apartment, but who advised Special Agent Hofmann that they were unable to provide the Secret Service with any information concerning her present whereabouts.

4. Information supplied to the United States Secret Service by the Federal Bureau of Investigation to the effect that an in-

vestigation has disclosed that Joanne Miyamoto and Mary Kochiyama are currently members of the Asian Americans for Action, a Japanese led organization, which organization has in the past demonstrated against the United States-Japan Security Treaty.

5. Federal Bureau of Investigation Intelligence information provided to your deponent and the United States Secret Service describes Mary Kochiyama as a contact for various extremist groups in New York City, including the Black Panther Party and the Black Liberation Army.

It is the opinion of the undersigned and of the United States Secret Service that the existence of the firearm described in your deponent's affidavit in support of this search warrant and the involvement of the above-mentioned individuals poses a serious threat to the personal safety of the Emperor of Japan and others during the official visit to the United States. Accordingly, pursuant to Title 18 of the United States Code, Section 2056 and the authorization to protect the person of a visiting head of a foreign government as embodied therein, the foregoing information is provided in support of the application of the United States for a search warrant for the above-described premises.

WHEREFORE, your deponent respectfully requests that a search warrant be issued authorizing your deponent or any Special Agents of the United States Secret Service to search the PREMISES KNOWN AS APARTMENT 4B, 925 UNION STREET, BROOKLYN, NEW YORK,

SUCH PREMISES BEING A SIX STORY BRICK BUILDING, SUCH BUILDING BEING POPULARLY KNOWN AS THE MILDRED BUILDING and to seize the above-described firearm and any other evidence relevant thereto.

/s/ Neal Findley
S/A Neal Findley, U.S.S.S.

Sworn to before me this
3rd day of October 1975

VINCENT A. CAPOGGIO
United States Magistrate
Eastern District of New York

U.S.M. E.D.N.Y.

REPLY AFFIDAVIT OF NEAL FINDLEY,
SWORN TO JANUARY 28, 1976

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x
UNITED STATES OF AMERICA

-against- AFFIDAVIT

KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG, 75 CR 851

Defendants.
----------x

STATE OF NEW YORK)
COUNTY OF KINGS) ss.:

NEAL FINDLEY, being duly sworn, deposes and says:

1. The affidavit submitted by William Liebovitz, the attorney for the defendant Kenneth Raymond Chin, alleges that I had "ample opportunity", prior to the issuance of a warrant to search the defendant's premises, "to learn and know in the ordinary and prudent exercise of [any] duty" that the defendant Elizabeth Jane Young did not pose any threat to the safety of the Emperor of Japan during his visit to New York City which commenced on October 4, 1975 (Aff. p. 2).

2. Specifically, Mr. Liebovitz alleges that we failed improperly to conduct "any surveillance of the defendants personally

to determine the truth or falsity of the claim made in [my] affidavit that the defendants were connected with a threat to the Emperor's or others' personal safety." What he claims should have been undertaken was a twenty four hour surveillance, and that "the slightest effort by the defendants to go anywhere or do anything that appeared, however remotely, to be preparatory to making any physical contact with or otherwise causing any threat to the Japanese Emperor would instantaneously have been followed inch by inch through "appropriate surveillance" (Aff. pp. 2-3).

3. Mr. Leibovitz concludes this aspect of his attack on my credibility by alleging that (Aff. p. 4):

> "what would have been revealed to Agent Findley by any good faith, direct surveillance of the defendants is exemplified by the provable events of October 4, 1975, on the morning of their arrest. While their residence was being searched Ms. Young was attending a weekly four-hour class in plumbing at Local No. 1 of the Plumber's Union in Brooklyn, New York where she has been an indentured trainee of the Union. Such facts were and are readily verifiable by the government. At the same time defendant Chin was doing the weekly household shopping and was arrested upon returning to the residence carrying large bundles of groceries. Such were the defendants' activities on the first day of the Japanese

> Emperor's arrival in New York City. Obviously, they were not engaged in threatening the safety of His Excellency, as Agent Findley had alleged without benefit of any previous direct surveillance of these defendants. His failure to conduct any such surveillance before swearing to an "opinion" of the serious threat allegedly posed by them was a reckless disregard of the truth."

4. The allegations are based upon an obvious lack of knowledge of the time pressure under which we were operating and the practical problems posed by direct surveillance. The information which formed the basis of my supplemental affidavit was relayed by the Federal Bureau of Investigation to the Secret Service sometime on October 1, 1975, and was received by teletype by the Secret Service in New York at 11:15 A.M. on October 2, 1975. The Emperor of Japan was scheduled to arrive in New York City on October 4, 1975 and to attend a football game at Shea Stadium on October 5, 1975. Accordingly, if the warrant was to be executed during daylight hours, prior to the arrival of the Emperor, it had to be obtained sometime on October 3, 1975.

5. We therefore had no more than twenty four hours to act. This provided us with little enough time to check out certain basic facts, much less conduct an extensive surveillance. And, more significantly, it has been our experience that physical surveillance is notoriously unreliable, par-

in a large metropolitan area, where the risk of losing the suspect on a crowded street, highway, or subway is not insignificant. Of course, needless to say, these defendants were not the only persons who the Secret Service was concerned about with regard to the safety of the Emperor. At least two dozen other persons were potential threats who had to be investigated.

6. Moreover, the fact that "the provable events" on October 4, 1975, the morning of their arrest would have demonstrated that the defendants were not "engaged in threatening the safety of His Excellency" hardly proves anything. On November 21, 1963, for example, "the provable events", which would have been disclosed by a physical surveillance of Lee Harvey Oswald, were that he spent the day at the home of his wife and children, that he played on the lawn with his daughter Junie, that he ate dinner with his family at 6:30 P.M., and went to bed at 11:30 P.M. (Manchester, The Death of a President, 102-105 [1967]). Very little would have been disclosed to indicate that he would attempt to assassinate the President of the United States the next day. On the other hand, a search of those premises would have likely resulted in the seizure of the murder weapon.

7. Several other claims made by Mr. Leibovitz relating to the good faith of the Secret Service merit a response:

a. First, at no time to my knowledge did any member of the Secret Service alert the news media to the fact that a search

would take place. Such action would have been contrary to our policy. And, indeed, such prior disclosure could have been embarrassing had the search proved fruitless. We did, however, alert the New York City Police Department to the fact that the search would be made. This is done so that they can properly respond to calls from neighbors regarding what may be a forcible entry into an apartment. It is conceivable that the leak emanated from that source.

b. Second, this case was transferred to the Alcohol, Tobacco & Firearms Bureau of the Treasury Department because the evidence disclosed by the search established a clear violation of the laws regulating firearms (a matter within its jurisdiction). Although a veritable arsenal of weapons was uncovered, including the weapon which was the subject of the search warrant,* there was no direct evidence to charge the defendants with a conspiracy to assassinate the Emperor of Japan. While it is true that the defendants were released from custody before the Emperor's departure from the United States, they were not released until after his departure from New York and, of course, after the seizure of weapons. By this time there was reason to believe that whatever threat they may have posed was significantly diminished.

c. Third, the defendants attack the truthfulness of Paragraph "1" of my supple-

* Annexed hereto as Exhibit A are photographs of the weapons and related items seized.

mental affidavit which alleges: "Investigation by Special Agents of the United States Secret Service which revealed that during the year 1973 Elizabeth Jane Young resided at 4303 Arlington Avenue, Los Angeles, California with one Joanne Miyamoto.

The defendants claim that Joanne Miyamoto did not reside at 4303 Arlington Avenue, Los Angeles, California, but at "a separate residence bearing no resemblance to the address of Ms. Young." This allegation is only partially accurate. First, let me say, we have been advised by the Federal Bureau of Investigation that the correct address on Arlington Avenue in which the defendant Young resided was 4304 rather than 4303 Arlington Avenue and that the discrepancy was due to a typographical error in the transmission of the information. Second, it is true that Joanne Miyamoto did not reside at that address; however, she did reside in an adjoining two story house at 2208-43rd Street immediately around the corner from the one-story residence of Ms. Young at 4304 Arlington Avenue. This discrepancy in the affidavit is, I believe, attributable to the haste with which the information was gathered and the supplemental affidavit was prepared.

/s/ Neal Findley

Sworn to before me
this 28th day of January, 1976.

/s/ Olga S. Morgan
OLGA S. MORGAN
Notary Public of New York
No. [illegible]
Qualified in Kings County
Commission Expires March 30, 1977